[redacted]

[redacted]

[redacted]

Petitioner,

v.

[redacted]

Respondents.

[redacted]

JOINT APPENDIX

[redacted]

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Counsel for Respondents

[redacted]

PETITION FOR CERTIORARI FILED AUGUST 15, 1989
CERTIORARI GRANTED NOVEMBER 13, 1989

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IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 86-19231-9

MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Plaintiffs,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida, WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Defendants.

COMPLAINT

NOW COMES MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend, and complains against Defendants, Jointly and severally, and states as follows:

COUNT I

PARTIES

1. Plaintiff, MARK HOWLETT, a minor, and both ELIZABETH HOWLETT and MARK HOWLETT are citizens of the United States, and residents of the City of St. Petersburg, Pinellas County, Florida.

2. At all times material, Plaintiff MARK HOWLETT was and is enrolled as a student of St. Petersburg Senior High School in St. Petersburg, Pinellas County, Florida. St. Petersburg High School is a public educational institutional operated by the Defendant SCHOOL BOARD OF

PINELLAS COUNTY, FLORIDA, a public body under Florida law.

3. At all times material, Defendant SCOTT ROSE was and is the superintendent of schools for Pinellas County, Florida, and serves at the pleasure and direction of Defendant SCHOOL BOARD.

4. At all times material, Defendant WILLIAM GREY was and is the principal of St. Petersburg Senior High School, and as such, is employed by, and serves at the direction of Defendants SCHOOL BOARD and ROSE.

5. At all times material, Defendant THOMAS PETIT was and is employed as the assistant principal of St. Petersburg High School, and as such, serves under the direction of Defendant SCHOOL BOARD, and Defendants ROSE AND GREY.

FACTS

6. This is an action for damages which exceed $5,000.00, exclusive of costs, interest and attorney fees, and for injunctive relief, for violations of the constitution of the United States, particularly the Fourth and Fourteenth Amendments thereto; the provisions of Title 42 United States Code, Section 1983; the Constitution of the State of Florida, particularly Article I, Section 12, and Rules promulgated by the Defendant SCHOOL BOARD, under the authority granted to said Defendant by Section 230.23 (6)(c) and (d), Florida Statues.

7. Each and all of the acts of Defendants alleged herein were done by Defendants, and each of them, under color of the statutes, ordinances, regulations, customs, and usages of the State of Florida, and the School District of Pinellas County, Florida, and under the authority of

their offices as school officials of said State and School Board.

8. On or about the morning of October 9, 1986, Plaintiff MARK HOWLETT was duly enrolled in and attending classes at St. Petersburg Senior High School, and was in good academic standing at said school.

9. Plaintiff MARK HOWLETT was summoned to a parking area outside the structure of St. Petersburg High School, and was directed to the location at which he had parked and locked his vehicle, a 1966 Volkswagen, upon his arrival at school that morning. The vehicle was properly and legally parked.

10. Defendant SCHOOL BOARD has delegated authority to school principals under its jurisdiction to effect and administer searches of students and their property. Defendant GREY in turn delegated authority to effect searches of students and their property at St. Petersburg High School to Defendant PETIT, without instructing Defendant PETIT as to the proper execution of said searches.

11. Upon arrival at his parked vehicle, Plaintiff HOWLETT learned that Defendant PETIT had illegally entered Plaintiff's locked vehicle by pushing in a side vent window, for the purpose of procuring information regarding ownership of said vehicle.

12. Defendant PETIT had learned, after his wrongful entry into Plaintiff's vehicle, that the vehicle belonged to Plaintiff. Defendant PETIT nevertheless continued to search Plaintiff's vehicle, even though his stated purpose for entering the vehicle—to determine ownership—had been fulfilled.

13. A valid Florida license tag had been, and was at all times relevant to this action prominently displaced on the

exterior of said vehicle, plainly visible to the naked eye from outside the vehicle.

14. Plaintiff MARK HOWLETT was confronted by Defendant PETIT with property which Defendant PETIT had seized from the interior of Plaintiff MARK HOWLETT's vehicle.

15. Said property was seized by Defendant PETIT from the locked interior of Plaintiff MARK HOWLETT's vehicle, said seizure by Defendant PETIT being effected in the absence of any reasonable suspicion whatsoever that entry into said vehicle would yield contraband, evidence of a crime or violation of school regulations, or any other justification whatsoever. The action by Defendant PETIT of entry into and seizure of property from Plaintiff's vehicle was undertaken under the authority conferred upon Defendant PETIT by Defendant GREY, Defendant ROSE, and Defendant SCHOOL BOARD.

16. The property seized consisted of three (3) empty wine cooler bottles, and a fourth bottle containing a small quantity of an eggnog-like substance, allegedly containing alcohol.

17. Plaintiff MARK HOWLETT was informed by Defendant PETIT that entry had been made into Plainiff's vehicle in order to locate evidence of ownership, so that the vehicle could be moved from its present location, which, according to PETIT was obstructing the movement of construction vehicles in the immediate area in which Plaintiff's vehicle had been parked.

18. At no time did Defendant PETIT, or any other Defendant, or agent of Defendant, make any effort to discern ownership of Plaintiff's vehicle, via a computer check of the license tag, a utilization of the high school's

public address system, or any other non-intrusive means of locating Plaintiff.

19. At no time did Defendant PETIT, or any other Defendant or agent thereof contact any towing company to effect removal of Plaintiff's locked vehicle from its location, without the necessity of physical entry into Plaintiff's vehicle.

20. At no time did Defendant PETIT, or any other Defendant or agent thereof, make any effort whatsoever to manually effect movement of said locked vehicle so as to permit the passage of vehicular traffic in the area near Plaintiff's vehicle.

21. As a result of the illegal seizure of property from Plaintiff's vehicle, Plaintiff MARK HOWLETT was suspended from attending classes at St. Petersburg Senior High School for a period of five (5) days for alleged violation of regulations pertaining to possession by students of alcoholic beverages, thereby seriously jeopardizing his timely completion of his matriculation and admission to and attendance at a college or university.

22. The conduct of Defendants, and each them, deprived Plaintiff MARK HOWLETT of the rights, privileges and immunities secured to him by the Fourth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 12 of the Constitution of the State of Florida, and the Code of Student Conduct enacted by Defendant SCHOOL BOARD, pursuant to the authority granted by Section 230.23(6)(c) and (d), Florida Statutes, to wit: the right of Plaintiff to be secure in his person and effects against unreasonable searches and seizures.

23. As a result of the aforementioned violation of Plaintiff MARK HOWLETT's rights by the Defendants,

Plaintiff HOWLETT has suffered humiliation, embarrassment, damage to his good name, and emotional distress.

24. The acts, conduct and behavior of Defendants, and each of them, were performed knowlingly and intentionally, and with reckless disregard and indifference to MARK HOWLETT's federal constitutional rights and his rights under Florida constitutional law, and other Florida law and regulations, by reason of which Plaintiff is entitled to an award of punitive damages in excess of $5,000.00.

25. Plaintiff has suffered irreparable harm and has no adequate remedy at law. Defendants will continue to engage in improper, unwarranted and illegal searches of student vehicles unless enjoined from doing so in the future.

WHEREFORE, Plaintiff demands judgment as follows:

A. Awarding Plaintiff compensatory damages in an amount in excess of $5,000.00.

B. Awarding Plaintiff punitive damages in an amount in excess of $5,000.00.

C. Entry of a permanent injunction enjoining the Defendants, and each of them, from any entry into, or search of students' motor vehicles.

D. A mandatory injunction ordering the Defendants, and each of them, to rescind the suspension previously imposed upon the Plaintiff MARK HOWLETT, expunging any reference to the incident in question from Plaintiff MARK HOWLETT's school record, and giving Plaintiff MARK HOWLETT a reasonable opportunity to make up all schoolwork missed as a result of the suspension upon him.

E. Award to Plaintiff attorney fees, pursuant to the provisions of Title 42 United States Code Section 1988, as well as costs and expenses of this action.

F. Any other relief deemed appropriate, equitable or just by this Honorable Court.

COUNT II

26. The Plaintiffs re-assert and re-allege each and every allegation of this Complaint contained in paragraphs 1 through 25, inclusive.

27. As a result of the wrongful and illegal search and seizure of Plaintiff's property as hereinbefore alleged, Plaintiff MARK HOWLETT was immediately suspended from attending regular classes at St. Petersburg Senior High School for a period of five (5) days for violation of school regulations pertaining to possession of alcoholic beverages on school grounds.

28. The suspension of Plaintiff HOWLETT was violative of Plaintiff HOWLETT's rights under State and Federal Constitutions and laws in at least the following three (3) particulars:

a. The suspension was effected in the absence of any proof, or effort to prove, that the substance in the bottle wrongfully seized from the Plaintiff's vehicle was indeed an *alcoholic* beverage.

b. The suspension was effected in the absence of proof that the substance in question was capable of being safely consumed, and thus was a "beverage."

c. The code of Student Conduct pertaining to possession of alcoholic beverages, (c)#2, Page H-12, is devoid of any definition whatsoever of what constitutes an "alcoholic *beverage*," in that said Code fails to state whether a substance must be capable of safe consumption in order to be classified as a "beverage," thus rendering it unconstitutionally vague and incapable of being understood or obeyed by an ordinary person. The suspension in question was effected by authority of Defendant PETIT, under the authority delegated to him by Defendant GREY, Defendant ROSE and Defendant SCHOOL BOARD.

29. The acts, conduct and behavior of Defendants, and each of them, were performed knowingly and intentionally, and with reckless disregard and indifference to MARK HOWLETT's federal constitutional rights and his rights under Florida constitutional law, and other Florida law and regulations, by reason of which Plaintiff is entitled to an award of punitive damages in excess of $5,000.00.

30. Plaintiff has suffered irreparable harm and has no adequate remedy at law. Defendants will continue to engage in improper, unwarranted and illegal suspensions of students unless enjoined from doing so in the future.

WHEREFORE, Plaintiff demands judgment as follows:

A. Awarding Plaintiff compensatory damages in an amount in excess of $5,000.00.

B. Awarding Plaintiff punitive damages in an amount in excess of $5,000.00.

C. Entry of a permanent injunction enjoining the Defendants, and each of them, from effecting student suspensions for possessory offenses absent proof that the item possessed is a contraband item.

D. Award to Plaintiff attorney fees, pursuant to the provisions of Title 42 United States Code Section 1988, as well as costs and expenses of this action.

E. Any other relief deemed appropriate, equitable and just by this Honorable Court.

COUNT III

31. The Plaintiffs re-assert and re-allege each and every allegation of this Complaint contained in paragraphs 1 through 30, inclusive.

32. The Code of Student Conduct, implemented by the Defendant SCHOOL BOARD, provides under Section (8), Page H-17, entitled *Due Process Procedures*, that before a student suspension can be effected,

> 1. "Notice of Hearing required: the hearing shall consist of an informal interview betwen the principal, or his designee, and the student. *The student shall be allowed to give a personal version of the incident;*"

The suspension of MARK HOWLETT was effected by Defendent PETIT without Plaintiff HOWLETT having a meaningful opportunity to "give a personal version of the incident," in violation of the Plaintiff's rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Florida Constitution, the provisions of Title 42 United States Code, Section 1983, and the aforementioned Code of Student Conduct, specifically paragraph 4, Page H-6, of the aforementioned Code of Student Conduct, which states "The student shall always be treated with fundamental fairness," said Code of Student Conduct having been implemented by Defendant SCHOOL BOARD under the authority conferred by Section 230.23 (6)(c) and (d), Florida Statutes.

33. Plaintiff further states that shortly after the incident giving rise to this action occurred, Defendant PETIT received information from Plaintiff MARK HOWLETT which disclosed the existence of a material issue of fact having a direct bearing on the question of Plaintiff's

involvement in the alleged offense. Defendant PETIT made no effort whatsoever to investigate the circumstances surrounding said information, and proceeded to immediately effect the aforementioned suspension of Plaintiff.

34. The acts, conduct and behavior of Defendants, and each of them, were performed knowingly and intentionally, and with reckless disregard and indifference of MARK HOWLETT's federal constitutional rights and his rights under Florida constitutional law, and other Florida laws and regulations, by reason of which Plaintiff is entitled to an award of punitive damages in excess of $5,000.00.

35. Plaintiff has suffered irreparable harm and has no adequate remedy at law. Defendants will continue to engage in improper, unwarranted and illegal suspensions of students unless enjoined from doing so in the future.

WHEREFORE, Plaintiff demands judgment as follows:

A. Awarding Plaintiff compensatory damages in an amount in excess of $5,000.00.

B. Awarding Plaintiff punitive damages in an amount in excess of $5,000.00.

C. Entry of a permanent injunction enjoining the Defendants, and each of them, from effecting suspensions of students in violation of the rights of said students as conferred by the constitutions of the United States, the State of Florida, Title 42 United States Code, Section 1988, as well as costs and expenses of this action.

D. Award to the Plaintiff attorney fees, pursuant to the provisions of Title 42 United States Code,

Section 1988, as well as costs and expenses of this action.

E. Any other relief which may be deemed just, equitable and necessary by this Honorable Court.

[Subscription omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

[Case number and title omitted in printing]

MOTION TO DISMISS

COME NOW the Defendants, the SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, SCOTT ROSE, WILLIAM GREY, AND THOMAS PETIT, pursuant to Fl.R.Civ.P. 1.140, and move to dismiss the Complaint filed in the above-styled cause, and state as grounds therefor:

1. As to all Defendants, and all counts and prayers for relief based on the law of the State of Florida, this Court has no jurisdiction over the subject matter in this dispute for the following reasons:

A. The Complaint seeks review of non-final agency action;

B. Pursuant to the Administrative Procedure Act (Chapter 120, Fla.Stat.), the only Court with jurisdiction to review agency action is the District Court of Appeal for the district in which the agency has its principal offices.

2. As to the Defendant, SCHOOL BOARD OF PINELLAS COUNTY, in all counts and prayers for relief based on U.S. Constitutional law and Title 42 § 1983 and 1988, U.S.C., this Court has no jurisdiction over the subject matter of the dispute for the following reasons:

A. A State Court can only hear claims of relief based on U.S. Constitutional law and on Title 20, § 1983 and 1988, if that Court has jurisdiction to hear such a claim based on State law;

B. The State of Florida, and its political subdivisions, has a common law immunity from civil suits not based on contract;

C. Fla.Stat. 768.28 has waived said immunity to a limited extent, but not to the extent of allowing an action based on the allegations set forth in the Complaint.

3. As to all Defendants, on all claims for injunctive relief, purporting to require the recision of Plaintiff's suspension, an expungement of any reference to the alleged incident from his records, and requesting that Defendants give MARK HOWLETT an opportunity to make up for any lost work, the Complaint fails to state a cause of action for the following reasons:

A. An injunction is an extraordinary writ, issued by a Court to prevent a party from engaging in certain conduct;

B. The allegedly illegal conduct complained of, as it relates to the claims for relief in this numbered paragraph, has already occurred and is therefore not remediable by injunctive relief;

C. The Complaint fails to allege that available administrative remedies have been utilized, or, in the alternative, that those remedies are inadequate.

4. As to all Defendants, and all counts and prayers for relief seeking to prevent future illegal searches, the Complaint fails to state a cause of action for the following reasons:

A. If the alleged search in question was in fact illegal, no injunction from any Court is necessary to prevent the type of conduct complained of from recurring;

B. Said claim of relief purports to seek protection for a class of individuals, and not the particular Plaintiffs in this cause, and the Complaint has totally failed to set forth any factors justifying a finding by this Court that Plaintiffs are qualified to represent

such a class of individuals, and has even failed to seek such a finding by this Court;

C. The Complaint fails to allege that available administrative remedies have been utilized, or in the alternative, that said administrative remedies are inadequate;

D. There is no allegation in the Complaint that the property allegedly seized by Defendants was owned by Plaintiffs, or that Plaintiffs had any proprietary interest in said property;

E. There is no allegation in the Complaint that Plaintiffs had a reasonable expectation of the privacy in the area from which the property was allegedly seized by Defendants.

5. As to all Defendants, and as to all claims of relief based on the alleged vagueness of the term "alcoholic beverage" as used in Paragraph 28 of the Complaint, the Complaint fails to state a cause of action for the following reasons:

A. The term "alcoholic beverage" is sufficiently clear in meaning, standing alone, so as to require no further definition to ensure due process of law;

B. The Complaint fails to set forth that available administrative remedies have been exhausted, or in the alternative that said administrative remedies are inadequate;

C. If students are in fact being suspended based on vague or overbroad regulations, no injunction is necessary from this Court;

D. The Complaint purports to seek protection for a class of individuals, and not for the particular Plaintiffs in this cause, and has totally failed to set forth any factors justifying a finding by this Court that Plaintiffs are qualified to represent such a class of individuals, and has even failed to seek such a finding.

6. As to all Defendants, and for all counts and prayers for relief relating to the claim that Plaintiff MARK HOWLETT was suspended without a meaningful opportunity to give a personal version of the incident, the Complaint fails to state a cause of action because of the following reasons:

A. The Complaint fails to allege that available administrative remedies have been exhausted, or in the alternative that those remedies are inadequate or futile;

B. If in fact the Defendants are suspending students without an opportunity to explain or give a version of their conduct, said suspensions would be illegal, and no injunction is necessary to prevent them;

C. The Complaint seeks protection for a class of individuals, but totally fails to set forth any factors justifying a finding by this Court that Plaintiffs are qualified to represent such a class of individuals, and even totally fails to request such a finding by this Court.

7. As to Defendant SCHOOL BOARD OF PINELLAS COUNTY, any prayer for relief involving punitive damages should be dismissed, pursuant to Florida law prohibiting punitive damages from being assessed against any political subdivision of the State of Florida;

8. As to Defendants ROSE and GREY, in addition to the grounds previously set forth, the Complaint fails to state a cause of action for the following reasons:

A. There is no allegation that either Defendant ROSE or Defendant GREY knew of or participated in the alleged search or the suspension in question prior to those events taking place;

B. There is no allegation that the alleged search or the suspension took place at the direction of either Defendant ROSE or Defendant GREY;

C. Without such prior knowledge or personal involvement, Defendants GREY and ROSE cannot be personally responsible for any allegedly illegal acts committed by others.

9. As to Defendant PETIT, on all claims for relief based on the alleged illegal suspension of Plaintiff MARK HOWLETT, the Complaint fails to state a cause of action for the following reasons:

A. The Complaint fails to allege that Defendant PETIT participated in or had any prior knowledge of the allegedly illegal suspension;

B. Without said participation or prior knowledge, Defendant PETIT cannot be held personally responsible for the allegedly illegal act.

WHEREFORE, Defendants pray that this honorable Court will enter its Order dismissing the Complaint filed herein in its entirety.

[Certificate of service and subscription omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
[Case number and title omitted in printing]

AMENDED MOTION TO DISMISS

COME NOW the Defendants, the SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, SCOTT ROSE, WILLIAM GREY, AND THOMAS PETIT, and amend the Motion to Dismiss served on counsel for Plaintiffs on January 14, 1987, by stating the following additional grounds:

1. As to all Defendants, and all claims for relief based on the alleged illegality of the "search" of Plaintiff MARK HOWLETT's motor vehicle, the issue of the legality and constitutionality of that search has been litigated in the case of The Matter of Mark Howlett, 86-6999DLANO, by this Court, and the Circuit Court has ruled that the seizure of the bottles described in the Complaint did not violate any provision of either the Constitution of the State of Florida or the Constitution of the United States;

2. The Plaintiff fails to state a cause of action as to any allegations concerning an illegal search of Plaintiff MARK HOWLETT's car in that the alleged search, as described in the Complaint, is as a matter of law reasonable and not illegal or proscribed by any statutory or constitutional protection.

3. As to the Defendant SCHOOL BOARD, the Complaint fails to state a cause of action under any theory that would warrant punitive damages either under the law of the State of Florida or under the law of the United States.

[Certificate of service and subscription omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 86-19231-9

MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Plaintiffs,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida, WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Defendants.

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

THIS CAUSE coming on to be heard upon the Motion to Dismiss of The School Board of Pinellas County, Florida, it is:

ORDERED that this cause is dismissed with prejudice on the authority of *Coulter* v. *Davin*, 373 So.2nd 423 (2nd DCA 1979) and *Hill* v. *Department of Corrections*, Supreme Court of Fla., Case No. 69016, 12 FLW 495.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 27 day of October, 1987.

/s/David F. Patterson
David F. Patterson,
Circuit Judge

[Notation of mailing omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

[Case number and title omitted in printing]

PLAINTIFFS' MOTION FOR REHEARING

The plaintiffs move for rehearing on the following grounds:

1. The Court failed to consider that the case upon which it relied in dismissing the complaint, *Hill* v. *Department of Corrections*, Supreme Court of Florida, Case No. 69016, 12 FLW 495 (September 24, 1987) involves a *state* agency which is immune from suit under Section 1983 (42 USC § 1983, the federal Civil Rights Act of 1871), whereas the present case involves a local school district, a *local* agency which is *not* immune from suit under Section 1983.

2. The court failed to consider that the *Hill* case, being grounded on the sovereign immunity of the *state* and *state agencies* from suit under Section 1983, impliedly recognized that *local* agencies, such as the Pinellas County School District in this case, are *not* immune from suit under Section 1983, whether the suit is brought in state or federal court.

3. The court, in relying upon *Coulter* v. *Davin*, 373 So.2d 423 (Fla. 2d DCA 1979), failed to consider that exhaustion of state administrative remedies is not required in a proceeding under Section 1983.

MEMORANDUM OF LAW

I

A state and its agencies are immune from suit for money damages under Section 1983 in federal court.

Quern v. *Jordan*, 440 U.S. 332 (1979). It and its agencies are also immune from such suit under Section 1983 in a state court. *Karchefske* v. *Department of Mental Health*, 143 Mich. App. 1, 371 N.W. 2d 876 (1985), and other cases cited in *Hill* v. *Department of Corrections*, *supra*. On the other hand, a *local* governmental agency, such as the Pinellas County School District in this case, is not immune under Section 1983 in federal court. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977). Nor is it immune under Section 1983 in state court. *DeBleecker* v. *Montgomery County et al.*, 292 Md. 498, 438 A. 2d 1348 (1982).

II

Of the six cases cited by the Florida Supreme Court in its decision in *Hill*, five involve the *state* or its *agencies* as defendants, all of which were declared to be immune from suit under Section 1983 in state court. The other, *DeBleecker*, *supra*, involves a county and a *local school district* as defendants. Both local agencies were held *not* to be immune in state court.

III

Coulter v. *Davin*, *supra*, was decided under state law, the Administrative Procedure Act, Chapter 120 Fla.Stat. (1985), under which exhaustion of administrative remedies is required. On the other hand, an action may be brought under Section 1983, even though administrative remedies are available and not exhausted. *Patsy* v. *Board of Regents of Florida*, 457 U.S. 496 (1982).

CONCLUSION

The order granting the motion to dismiss should be vacated and a new order entered denying the motion to

dismiss. Any valid, remaining objection can be raised by affirmative defense in the answer.

[Subscription and certificate of service omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 86-19231-9

MARK HOWLETT, et al,

Plaintiffs,

v.

SCOTT ROSE, et al,

Defendants.

ORDER DENYING MOTION FOR REHEARING

This cause came on to be heard upon Plaintiffs' Motion for Rehearing, and the Court being advised in the premises, it is upon consideration

ORDERED AND ADJUDGED that said Motion be and the same is hereby denied.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 24 day of November, 1987.

/s/David F. Patterson
David F. Patterson,
Circuit Judge

[Notation of mailing omitted in printing]

No. 87-3583

DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT.

FEB. 1, 1989.

MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Appellant,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Appellees.

CAMPBELL, Chief Judge.

This appeal on behalf of appellant, Mark Howlett, a minor, challenges the final order that dismissed with prejudice his complaint for injunctive relief and damages against the school board and several school officials. The state court action brought by appellant below was pursuant to the Judicial Civil Rights Act of 1871, 42 U.S.C. section 1983. Appellant raises three issues on this appeal:

I. **WHETHER THE QUESTION OF A STATE AND ITS SUBDIVISIONS' SOVEREIGN IMMUNITY TO AN ACTION BROUGHT IN A STATE COURT UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983, IS A QUESTION OF STATE OR FEDERAL LAW?**

II. **WHETHER UNDER FEDERAL LAW A FLORIDA SCHOOL BOARD IS IMMUNE FROM SUIT UNDER SECTION 1983?**

III. **WHETHER IT IS NECESSARY TO EXHAUST STATE REMEDIES UNDER THE FLORIDA ADMINISTRATIVE PROCEDURE ACT BEFORE BRINGING AN ACTION FOR DAMAGES IN A FLORIDA COURT UNDER SECTION 1983?**

Although our conclusion and answer to the first issue precludes the necessity of deciding the other two issues, we will briefly discuss those issues. We decide appellant's first issue on the authority of *Hill* v. *Department of Corrections, State of Florida*, 513 So.2d 129 (Fla. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988), and hold that the State of Florida has not waived its sovereign immunity from suits against it in its own state courts except to the extent provided in section 768.28, Florida Statutes (1985) for traditional state tort actions. See *Hill*. Thus, to the extent that the actions of the state and its agencies are protected by sovereign immunity, an action pursuant to section 1983 will not lie in state courts. The question of whether that sovereign immunity exists is a question of state law and not federal law. The question of the scope of that sovereign immunity, or whether a particular act is protected by that sovereign immunity, is not before us on this appeal, nor was it before the trial court. In both the trial court and on appeal, appellant argued that the question of whether a state has maintained its common law sovereign immunity from a section 1983 suit in its state courts is a question of federal law. It is not. The question of whether a state has waived its own common law immunity in its own courts is a question of state law. Appellant's primary argument thus fails and the trial court judgment must be affirmed.

At oral argument, this court's decision in *Elder* v. *Highlands County Board of County Commissioners*, 497 So.2d 1334 (Fla. 2d DCA 1986) was cited in support of appellant's position. Yet, the question of the common law

sovereign immunity of a state from suit in its state courts on a federal cause of action was neither presented nor discussed in *Elder*. *Elder* was decided on the basis of Eleventh Amendment immunity. As our supreme court stated in *Hill*, relying on *Ramah Navajo School Board* v. *Bureau of Revenue*, 104 N.M. 302, 720 P.2d 1243 (App.), *cert. denied*, 479 U.S. 940, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986), sovereign immunity and Eleventh Amendment immunity are distinct concepts. The eleventh amendment protects state government from the federal judiciary. Under the eleventh amendment, when a section 1983 action is brought against a state in *federal court*, the question is whether the defendant qualifies as a "person" under the act or is more properly an Eleventh Amendment protected state agency. The determination of *that* question in *that* context is a question of federal law. *However*, when a section 1983 action is brought in *state* court, the sole question to be decided on the basis of *state* law is whether the state has waived its common law sovereign immunity to the extent necessary to allow a section 1983 action in state court. *Hill* holds that Florida has not so waived its sovereign immunity. We therefore do not reach appellant's second issue in this case, i.e., whether under *federal* law a Florida school board is immune from a section 1983 law. There is no question under Florida law that agencies of the state, including school boards and municipalities, are the beneficiaries of sovereign immunity. The extent of that sovereign immunity and its applicability under Florida law in this case has not been addressed by appellant.

Neither do we reach the question of the failure of appellant to exhaust his administrative remedies inasmuch as he has not otherwise demonstrated his right to pursue his section 1983 action in Florida's courts.

While appellant has cited numerous decisions of the United States Supreme Court dealing with the nature of state agencies and their resulting immunity or lack of it in section 1983 suits, those cases are all distinguishable because they deal primarily with Eleventh Amendment immunity or actions in federal courts. *Patsy* v. *Board of Regents of State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Mt. Healthy City School Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Moor* v. *County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942).

The one case that we would particularly distinguish is *Martinez*. While *Martinez* involved a section 1983 action in a California state court, the question of immunity in that case was based on the attempted application of a California statute that sought to immunize state officials from injuries resulting from particular conduct. In other words, it was an attempt by the state to immunize itself from a particular cause of action. *Martinez* does not pertain to the question of state common law immunity from the use of its courts for suits against the state in those state courts. The question of whether a state has opened its own courts for federal actions against the state which the state does not otherwise recognize is purely a question of state law.

AFFIRMED.

RYDER and FRANK, JJ, concur.

Supreme Court of Florida

CASE NO. 73,745

District Court of Appeal,
Second District No. 87-3583

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,
Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT AND THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Respondents.

WEDNESDAY, MAY 17, 1989

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., SHAW, GRIMES and KOGAN, JJ., concur
MCDONALD, J., dissents

Supreme Court of the United States

No. 89-5383

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Petitioner

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida, et al.

ON PETITION FOR WRIT OF CERTIORARI to the District Court of Appeal of Florida, Second District.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 13, 1989